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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 426

FLORENCE SCOTT, Formerly FLORENCE MESLER MONTAGUE, an Individual,

Petitioner,

v.

WKJG, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

The petition for certiorari (p. 2) attempts to present questions which completely miss the rationale and import of the holdings of the Trial Court, District Court for the Northern District of Indiana, Fort Wayne Division, 149 U.S.P.Q. 413, as unanimously affirmed by The Court of Appeals for the Seventh Circuit, 376 F. 2d 467, and which demonstrate a complete lack of understanding of basic copyright law.

A fair reading of the Trial Record (as contained in the Joint Appendix), and the District Court and Court of Appeals opinions herein, clearly establishes that petitioner

has failed in her required burden of proof of access, or even a reasonable possibility of access, without which there cannot be copying or infringing use.

Petitioner's main reason for the granting of certiorari appears to be that the traditional holding of non-infringement herein conflicts with the Ninth Circuit Court of Appeals decision in *Benny* v. *Loew's, Inc.*, 239 F. 2d 532 (1956), aff'd by an equally divided Court 356 U. S. 43, (1958). This contention is entirely without merit, and respondents urge that certiorari not be granted absent a clear showing that the comprehensive opinion of the Trial Court, as unanimously affirmed by the Seventh Circuit Court of Appeals is "clearly erroneous".

Statement of the Case

Petitioner's Statement of the Case (pp. 3-5) completely overlooks that the Trial Court, sitting as the trier of fact, believed the testimony of the author of the alleged infringing television play to the effect that she had never seen or read petitioner's play prior to the commencement of this litigation, and that she neither copied from nor infringed petitioner's play.

Petitioner's play was never published, and even the barest possibility of access was so tenuous as to cause the Trial Court to conclude that the evidence could not possibly support a finding of copying.

With respect to alleged similarities between the two works in question, the Trial Court compared the two works, applied the "ordinary observer" test, and found that they were "two different plays" entirely. The testimony of an expert witness to assist the trier of facts in determining the superficiality of alleged similarities was perfectly proper, and in no way diminishes the ultimate finding of non-infringement in the eyes of the trier of fact. Petitioner conceded at trial that there was no evidence or

proof of copying, and the alleged similarities were found by both the Trial Court and Court of Appeals to be patently insufficient to raise the likelihood or even the probability of copying. In fact, the Trial Court found that the alleged similarities are "in different contexts, are stock situations or phrases that are likely to occur in plays concerning the general subject matter of these two plays, or are not similar at all" (J. A. 470-71).

Petitioner has made no effort to show that any of the findings of the Trial Court or Court of Appeals were "clearly erroneous". The reason for this fatal omission is obvious—the findings are fully supported by evidence of probative force.

Argument

The main thrust of petitioner's reasoning in support of the granting of a writ of certiorari appears to be that the Seventh Circuit decision herein conflicts in some unknown way with *Benny* v. *Loew's, Inc., supra.* The *Benny* case was a parody or burlesque case wherein it was held that Jack Benny's television sketch entitled "Autolight" infringed the copyright of the dramatic work entitled "Gaslight". Benny admittedly was satirizing "Gaslight" and admittedly had access to and copied greatly from the protected work. The only contested issue was whether or not the substantial copying, both in quality and quantity, constituted a "fair use". *Cf. Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348 (S. D. Cal., 1955); *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541 (2d Cir. 1964).

In *Berlin*, Circuit Judge Irving R. Kaufman excellently analyzed the *Benny* and *Columbia* holdings at page 544 as follows:

> "The distinction between the two situations, Judge Carter reasoned, turned on the relative significance or

'substantiality'—in terms of both quality and quantity —of the material taken from the original motion pictures. In both cases, the Court recognized in painstaking and scholarly opinions the historic importance and social value of parody and burlesque; in both, it conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to 'recall or conjure up' the original work if the parody is to be successful. But in Benny's case, the Court concluded, this license had been grossly exceeded. Not only had the parody followed the general plot of the original motion picture, but specific incidents and details had been copied and extensive portions of the dialogue had been reproduced verbatim. It was this borrowing from the original to a far greater degree than that required if the parody is to 'recall or conjure up' that original, which caused the court to reject the defense of 'burlesque'; and, it was in this context that the Court of Appeals for the Ninth Circuit affirmed Judge Carter's determination.

But despite Benny's 'borrowing' of substantially more material from the copyrighted original than was necessary for a successful burlesque, the Benny holding and its accompanying dictum suggesting that parody could not be justified as 'fair use' was roundly criticized by many commentators."

It is inconceivable how the *Benny* parody case, where there was admitted substantial copying, can in any way conflict with the Seventh Circuit affirmation herein of the Trial Court's finding of *no access* and *no copying*.

Irrespective of petitioner's mistaken reliance on *Benny*, a finding of infringement herein cannot be supported unless petitioner can conclusively offer proof that the Trial Court's finding of *no access* and *no copying*, as affirmed unanimously by the Seventh Circuit, was "clearly erroneous". *Darrell* v. *Joe Morris Music Co., Inc.*, 113 F. 2d

80 (2d Cir. 1940). Even assuming *arguendo* that an appellate court, upon reading the two works in question, found the existence of "substantial similarity", the *Darrell* case held that such a finding would not justify a reversal of the Trial Court's finding of no access and no copying.

Rather than conflicting with the Ninth Circuit, the Seventh Circuit opinion herein is a traditional affirmation of copyright law and principles, adopted in all jurisdictions, where there can be no infringement absent proof of access, copying and unlawful appropriation of protected material. See: *Arnstein* v. *Porter*, 154 F. 2d 464 (2d Cir. 1946); *Harold Lloyd Corp.* v. *Witwer*, 65 F. 2d 1 (9th Cir. 1933); *Caruthers* v. *R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937); *Twentieth Century-Fox Film Corp.* v. *Stonesifer*, 140 F. 2d 579 (9th Cir. 1944).

Further, absent direct proof of access or proof of reasonable possibility of access, access and copying may be implied only if the similarities in the two plays are so "striking" and of such a nature as to preclude the possibility of coincidence, accident, or independent creation. *Twentieth Century-Fox Film Corp.* v. *Dieckhaus*, 153 F. 2d 893 (8th Cir. 1946); *Dellar* v. *Samuel Goldwyn, Inc.*, 150 F. 2d 612 (2d Cir. 1945); *Wilkie* v. *Santly Bros.*, 91 F. 2d 978 (2d Cir. 1937); *Heim* v. *Universal Pictures Co.*, 154 F. 2d 480 (2d Cir. 1946); *Shipman* v. *R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533 (2d Cir. 1938); Yankwich, *Originality In The Law of Intellectual Property*, 11 F.R.D. 457.

To impeach the uncontradicted testimony of respondents' credible witnesses as to independent creation, the similarities between the two plays must be so "striking" and so "novel" that they establish copying and piracy with reasonable certainty, and that no other conclusion is reasonably possible. *Rosen* v. *Loew's, Inc.*, 162 F. 2d 785 (2d Cir. 1947); *Morse* v. *Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954); *Jewel Music Pub. Co., Inc.* v. *Leo Feist, Inc.*, 62 F. Supp. 596 (S.D.N.Y. 1945).

Even evidence of access and substantial similarity, totally absent here, does not require the trier of fact to conclude that there was copying or infringement. Accordingly, if the Trial Court herein believed respondents' evidence of independent creation, a finding of no copying may be upheld, even if proof of access and substantial similarity were present here. *Rosen* v. *Loew's, Inc., supra; Malkin* v. *Dubinsky,* 203 N.Y.S. 2d 501 (1960); *Fred Fisher, Inc.* v. *Dillingham,* 298 Fed. 145 (S.D.N.Y. 1924); and *Sarkadi* v. *Wiman,* 43 F. Supp. 778 (S.D.N.Y. 1942), aff'd 135 F. 2d 1002 (2d Cir. 1943).

Petitioner's entire contention of infringement is based on a strained, hypercritical dissection of isolated ideas and words, and the Trial Court was correct in concluding that the two plays were so significantly different as to sequence, characterization, characters, scenes, settings and style of writing as to be "two entirely different plays" (J. A. 473). In affirming this finding, the Seventh Circuit was correct in holding "that copyright protection does not extend to ideas, plots, dramatic situations and events. Rather, it is limited to the arrangement of words the author uses to express his ideas." *Funkhouser* v. *Loew's, Inc.,* 208 F. 2d 185 (8th Cir. 1953), cert. den. 348 U. S. 843 (1954); *Schwarz* v. *Universal Pictures Co.,* 85 F. Supp. 270 (S. D. Cal. 1949); *Echevarria* v. *Warner Bros. Pictures, Inc.,* 12 F. Supp. 632 (S. D. Cal. 1935); *Seltzer* v. *Sunbrock,* 22 F. Supp. 621 (S. D. Cal. 1938); *Pinci* v. *Twentieth Century-Fox Film Corp.,* 95 F. Supp. 884 (S.D.N.Y. 1951); *MacDonald* v. *DuMaurier,* 75 F. Supp. 653 (S.D.N.Y. 1946); *Burnett* v. *Lambino,* 204 F. Supp. 327 (S.D.N.Y. 1962); *Rosen* v. *Loew's, Inc., supra; Dellar* v. *Samuel Goldwyn, Inc., supra.*

Petitioner's second and third purported reasons for granting a writ of certiorari (Pet. pp. 6-8) also totally ignore that the trier of fact herein has found that petitioner's play was not adapted by respondents, and that in fact the two plays in question are two entirely different

plays. With respect to petitioner's assertion that the "ordinary observer or audience test" is reason for granting a writ of certiorari, the Trial Court properly relied on its "own impressions" in finding that the two plays in question were not similar enough, either in the strained aspects listed by the petitioner or in the general impressions left with the average reader or viewer, to establish either copying or infringement and it was perfectly proper for the Trial Court to avail itself of (although not to be bound by) expert testimony. *Arnstein* v. *Porter, supra; Nichols* v. *Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir. 1930); *Heim* v. *Universal Pictures Co., supra; Simonton* v. *Gordon*, 12 F. 2d 116 (S.D.N.Y. 1925).

The only other decision relied upon by petitioner, *Grove Press, Inc.* v. *Greenleaf Publishing Co.*, 247 F. Supp. 518 (E.D.N.Y. 1965), also presupposes access and copying. The findings below of no access and no copying, far from being "clearly erroneous", are fully supported by the evidence of probative force.

CONCLUSION

The writ for certiorari should be denied.

Respectfully submitted,

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